DRAFT

December ___, 2005

Federal Election Commission
Office of General Counsel
999 E. Street, NW
Washington, DC 20463

Re: Request for Advisory Opinion on State Reporting of Mixed Federal-State Expenditures

Dear Commissioners and General Counsel:

Please consider this letter as a request for an advisory opinion from the Federal Election Commission ("FEC") pursuant to FEC regulation 11 CFR 112.1. The California Fair Political Practices Commission ("FPPC") is the agency charged with interpretation and implementation of the Political Reform Act of 1974, as amended ("PRA"), which is the California counterpart of the Federal Election Campaign Act ("FECA"). In 2000, Proposition 34 established limits on contributions to state candidates and committees, including limits on the amounts that may be contributed to political party committees, and limits on the amounts that may be contributed to candidates and committees by political party committees. (California Government Code sections 85301-85303.)

California law has long required that a party federal committee's "contributions" or "independent expenditures" on behalf of state and local candidates or ballot measures be reported separately on its own state report, or on the party committee's non-federal report, California's Recipient Committee Campaign Report (FPPC Form 460).[1] As appropriate, other campaign reports are required for a party committee's "late contributions" (California Government Code section 84203 – FPPC Form 497) and "late independent expenditures" (Government Code section 84204 – FPPC Form 496), along with "supplemental pre-election statements," (Government Code section 84202.5 – FPPC Form 495), and "supplemental independent expenditure reports" (California Government Code section 84203.5 – FPPC Form 465.)

[1] The PRA was enacted by the people of California in a 1974 initiative measure. Government Code section 81002(a) indicates that first among the purposes of the PRA is that: "Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Thus all persons, including party federal committees, are required to disclose "receipts and expenditures in [California] election campaigns."

On behalf of the FPPC, I seek an advisory opinion on whether the FECA would preempt a proposed state regulation clarifying state reporting obligations when a California state or local political party committee's federal committee is required to expend its funds by 2 USCA section 441i for a public communication which identifies a federal candidate or officeholder in a "federal election activity" which *also* contains express advocacy for the election or defeat of a clearly identified state or local candidate or ballot measure.

In September 2004 the FPPC became aware of the need for clarification of the duties of political party committees reporting mixed federal and state or local campaign expenditures, when the treasurer of one such committee sought advice from the FPPC regarding an expenditure on an advertisement that contained recommendations on federal as well as non-federal candidates in an upcoming election. The FECA required that payment for this particular advertisement be made initially from the committee's federal account, but it permitted the federal account to be reimbursed by a non-federal account to reflect the portion of the advertisement devoted to non-federal candidates.[2] However, the FECA permitted a maximum reimbursement of 64 percent of the total cost, while the treasurer found that the true benefit to state candidates and issues amounted to 80 percent of the total cost. Because the FECA prohibited reimbursement of the full value of the advertisement (to non-federal candidates, measured by the relative allocation of advertising space as permitted by state law), the treasurer concluded that the federal account had in effect subsidized portions of the advertisement that featured non-federal candidates and issues.

The FPPC issued an advice letter[3] to reconcile the FECA's reimbursement limitation with the PRA's general requirement that all state committee income and disbursements be reported, by advising the treasurer to treat the federal "subsidy" as a contribution from the federal to the state committee, in the amount of 16 percent of the cost of the advertisement. As required by the PRA, the contribution would be allocated among contributors to the federal committee, the individual contributions being reported with the committee itself identified as an intermediary.

The problem highlighted in this advice letter is a recurrent one. To safeguard a federal interest in limiting the influx of non-federal funds into federal election campaigns, federal law governing mixed federal and state campaign spending establishes presumptions that expenditures attributable to federal election activities will *not* be less than a certain percentage of the whole. Indeed, the FECA often permits the entirety of such expenditures to be paid from federal funds. California's interest in the full and accurate disclosure of expenditures in state and local elections is not inconsistent with the federal interest, but California's interest is served by requiring that mixed federal and state expenditures accurately allocate value received by state and local candidates, without the use of fixed minimum or maximum percentages.

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[2] The committee in question maintained three bank accounts, registered as "committees" in their own right, as required by federal and state law.

[3] A copy of the *Boling* Advice Letter, No. A-04-212, is enclosed for your information. FPPC advice letters are similar in form and function to FEC advisory opinions, but they are written by staff under supervision of the FPPC's General Counsel; they are not typically reviewed by the Chairman or Commissioners.

The FPPC is considering a regulation that would essentially codify the approach taken in the *Boling* advice letter, and had begun that process when members of the regulated community expressed concern over federal preemption. The FPPC believes that a state regulation may require that a political party committee report mixed state and federal spending in a manner that differs in detail from reports submitted to the FEC, so long as the state reporting requirement has no effect on the rights or responsibilities of the committee under federal law. However, some members of the regulated community have argued that a state rule may not require committees to allocate and report mixed federal and non-federal expenditures in a manner that is "inconsistent" with federal reporting rules, insofar as the state reports call for information generated by different allocation formulas. The FPPC has not adopted, or indeed debated, specific provisions in the regulation originally proposed, choosing instead to seek guidance on pre-emption issues in advance of more particularized discussion. The anticipated regulation, however, may include some or all of the following provisions, contingent upon further consideration by the FPPC and on any guidance the FEC may offer regarding the permissible limits of state action:

- Contributions into "Levin" accounts, and/or "allocation" accounts established under the FECA would be disclosed in state reports, if expenditures from those accounts gave rise to reporting obligations under state law because they funded communications expressly advocating the election or defeat of state candidates or measures. Because Congress specifically provided that Levin funds are subject to state contribution limits, contributions to Levin accounts might be made reportable regardless of expenditure activity, so that California could monitor and enforce the limitation on contributions to political party committees found at Government Code section 85303(b).

- If federal law permits or requires that a payment for mixed federal and state or local activities be made from a committee's federal account, any committee obligated under the PRA to report the portion expended on state or local election activities must report the expenditure in an amount determined by allocation methods authorized by the PRA. Allocation formulas prescribed in federal law for use in federal reports may be employed in state reports if they are consistent with accounting methods permitted under the PRA. If they are not, the reporting committee will use state rules when filing state reports.

- If a federal committee is not fully reimbursed by a state committee for expenditures of federal funds on state or local election campaigns, a circumstance illustrated in the *Boling* Advice Letter, the effective "subsidy" is treated (for purposes of state law) as a transfer of contributions allocated among contributors to the federal account, and reported as such on state disclosure forms. This rule would include a proviso that contributions allocated in such cases to particular contributors to the federal account would not expose those contributors to liability for inadvertent violation of section 85303(b).

The FPPC will very much appreciate any assistance you can provide us in this area.

Very truly yours,

Liane Randolph
Chairman,
California Fair Political Practices Commission

Enclosure: *Boling* Advice Letter, No. A-04-212